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Obligations, governance and society: Bringing the state back in

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I. The Retreat of Obligations

‘The owl of Minerva begins its flight only with the onset of dusk,’ so Hegel said in one of his more famous aphorisms.¹ By this, he meant that it is in a philosophical tradition’s dying light that its particular, distinctive features come into clearest focus. So, it would seem, it is with the law of obligations. The past thirty years have seen an explosion in obligations theory, shedding new light on the nature and significance of a vast range of its peculiar features. Yet this comes at a time when the law of obligations is less relevant in the common law world than it has ever been in modern times – and in ways that show a striking, and surprising, convergence in different common law jurisdictions, whilst at the same time representing a dramatic divergence with the past of the common law.

Two trends in the recent history of the law of obligations illustrate the extent of this convergence and divergence. The first is its retreat in the face of other, more recently formed areas of law. Take, for example, the rise of public law. The place that is today occupied by public law was once seen as part of the province of the law of obligations. As late as 1949, Lord Denning forcefully expressed the view in his Hamlyn Lectures that it was private law – tort, estoppel and the equitable remedies of declaration and injunction – that would accomplish the great task of bringing the administrative state under the rule of law. The prerogative writs – mandamus, certiorari, prohibition – were, in his view, unsuited to play this broader role.² Views similar to Denning’s were once broadly held,³ but few today would assert a similar view in any common law jurisdiction. The signs of the demise of this approach can already be seen in the case which is widely taken to mark the revival of the tort of negligence – the decision of the House of Lords in *Home Office v Dorset Yacht*.⁴ Lord Diplock, in a little remarked-on passage in his concurring speech in that case, held that it was not generally the province of the law of tort to define the standards of conduct to which public authorities are held. That task was appropriately left to public law, and recovery in *Dorset Yacht* itself was only permissible because the actions of the Home Office were in breach of a public law standard. This restricted vision of the role of tort law, whilst not conventionally seen as part of that case’s ratio, underlay his later decision in *O’Reilly v Mackman*,⁵ and also closely parallels more recent jurisprudence in England,⁶ Ireland⁷ and Australia⁸ on the liability of public authorities in tort – and, in particular, the concerns about the effects of the imposition of private law standards upon the functioning of public bodies that underlies this jurisprudence.⁹

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¹ GWF Hegel, *Elements of the Philosophy of Right* (HB Nisbet trans., Cambridge, Cambridge University Press, 1991) 23.

² A Denning, *Freedom Under the Law* (Stevens 1949), 126.

³ TT Arvind, ‘Restraining the State through Tort? The Crown Proceedings Act in Retrospect’ in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2012).

⁴ [1970] AC 1004 (HL).

⁵ [1983] 2 AC 237 (HL).

⁶ See Jenny Steele, ‘(Dis)owning the Convention in the Law of Tort’, in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford, Hart Publishing, 2010)

⁷ *LM v Commissioner of An Garda Siochana* [2011] IEHC 14.

⁸ *Sullivan v Moody* (2001) 207 CLR 562.

⁹ This parallels the trend in certain sections of obligations theory, where the relationship between private law wrongs and public law wrongs is seen as requiring the removal of obligations involving public bodies – such as the tort of misfeasance in public office, or duties of care involving the exercise of statutory powers by public authorities – from

This trend is not universal, with Canada¹⁰ and New Zealand,¹¹ in particular, being more willing to grant a role to the law of obligations in relation to public bodies. Far more widespread, however, is the second, and not unrelated, trend, namely, the growing displacement of the law of obligations by new forms of administrative redress which are provided not by the courts but by the regulatory and administrative bodies that characterize the modern state. Financial services – where regulation has replaced the common law for all practical purposes – are the most obvious example, but the trend is far broader, encompassing disputes ranging from noisy neighbours to the industrial exploitation of sub-soil resources. This displacement is to some extent legislative, reflected in statutes such as the Infrastructure Bill, currently in the process of being passed by the UK Parliament, which replaces trespass and nuisance¹² with a new, discretionary statutory scheme of compensation¹³ in relation to harm caused by the exploitation of petroleum or geothermal energy. But it is not just a statutory phenomenon. The courts, too, have contributed in significant ways to the displacement of the law of obligations by regulation. The decision of the UK House of Lords in *Marcic v Thames Water*¹⁴ is a clear example. But so, too, are the police liability cases in the various commonwealth jurisdictions that have refused to find a duty of care. The effect of these cases – and particularly the English¹⁵ and Irish¹⁶ authorities – has been to create a new form of non-justiciable duty previously unknown to the common law, with the courts in effect withdrawing from the task of determining whether the police discharged their legal obligations in a given case.

Cumulatively, these trends point to a diminution of the role of the law of obligations in setting standards of conduct in relation to the type of questions that arise in modern social life, with that task being increasingly left to statute, regulation, and private frameworks. This diminution is seen in a wide variety of decisions in the past four decades, ranging from *Photo Productions v Securicor*,¹⁷ which ended the role of the common law in determining the limits of freedom of contract in favour of leaving it to statutory regulation, to the peculiar direction taken by the *ex turpi causa* defence in the recent English cases of *Gray v Thames Trains*¹⁸ and *Twigger v Safeway*.¹⁹ The reasoning in both cases rested on the view that it was not appropriate for the law of obligations to intervene in an attribution of responsibility been made by some other branch of law, nor to take any action that might seem to dilute or interfere with it. In *Caparo Industries plc v Dickman*²⁰ itself, as in its counterparts elsewhere,²¹ it was ultimately a regulatory framework – the role of the statutory audit under the Companies Act 1948 – that proved decisive.

Equally, they also correlate with a diminution in the perceived public importance of the law of obligations. Across the common law world, governments have been amending procedural and substantive rules to eliminate entire areas of the law of obligations, or to ration access to the courts. The Ipp Reforms in Australia, the reforms to costs and legal aid in England and Wales, and the abolition of the civil action for breach of health and safety law in England and Wales²² illustrate the breadth and range of the types of measures that have been taken with the express purpose of reducing the public role of the law

the law of obligations. See e.g. E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford, Oxford University Press, 2009) at 37-38.

¹⁰ *Hill v Hamilton-Wentworth Regional Services Board* [2007] 3 SCR 129.

¹¹ *Couch v Attorney-General* [2008] 3 NZLR 725.

¹² ss. 39 – 40, and esp. s. 40(1),(3).

¹³ s. 41.

¹⁴ [2003] UKHL 66, [2004] 2 AC 42.

¹⁵ *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2.

¹⁶ *AG v JK, Minister for Justice Equality & Law Reform* [2011] IEHC 65.

¹⁷ [1980] AC 827 (HL).

¹⁸ [2009] UKHL 33, [2009] 1 AC 1339.

¹⁹ [2010] EWCA Civ 1472, [2011] 2 All ER 84.

²⁰ [1990] 2 AC 605 (HL).

²¹ See e.g. the decision of the Supreme Court of Victoria in *R Lowe Lippmann Figdor and Franck v AGC (Advances) Ltdm* [1992] Vic Rp 93, [1992] 2 VR 671.

²² Enterprise and Regulatory Reform Act 2013, s. 69.

of obligations. And, as the last of these examples demonstrates, the object of these changes is *only* to reduce the role of the law of obligations – not regulation. The reforms to health and safety law did not diminish the powers of the Health and Safety Executive, or reduce its prosecutorial powers. It was only the law of obligations that was their target. Likewise, the fact that the majority of common law courts, in cases like *Caparo*,²³ *Esanda*,²⁴ and *Hercules Management*,²⁵ have held auditors not liable to third parties for negligently approving false accounts does not mean that auditors are thereby off the hook. It simply means that responsibility for dealing with this particular issue has passed into the domain of regulatory action, as seen – for example – in instruments such as the EU Audit Directive²⁶ and Regulation.²⁷

These trends become even starker when we put them in the context of the role played by the law of obligations in responding to matters of current social concern. A central feature of the legal response to the 19th century banking crises was the role played in it of concepts and frameworks taken from private law – with notions of ‘fraud’, ‘trust’ and ‘fiduciary conduct’ playing a leading role not just in the actual legal proceedings brought against those held responsible for bank failures, but also in the laws that were enacted in the wake of the failures.²⁸ Against this backdrop, the absence of these legal ideas in the response to the ongoing banking crisis is striking, and points to a very significant shift in the legal understanding of the role private law ideas can and should play within the broader legal system.²⁹

What we see, therefore, is a clear trend towards the subordination of the law of obligations to other areas of law, and a corresponding reduction in the role it plays in the modern state, which mark not just a limited convergence within the common law world, but also a divergence with the historical role of the law of obligations. Is this trend, then, a matter of concern, and should it be reversed? These questions are the subject of this chapter. The central argument it makes is that whilst regulation has an important role to play within the legal system, the trend of letting it displace the law of obligations is misconceived because there are reasons to return to a broader role for the law of obligations. Explaining why this is so and what that broader role is, however, requires us to significantly alter our understanding of what the law of obligations is, and why it matters. It requires us to move from looking at the *convergences* in the law of obligations to *divergences* present and past – the emergence, in the present, of approaches in some jurisdictions that challenge the trend of the retreat of obligations; and the presence, in the past, of a radically different conception of the role of the law of obligations in the polity. This, in turn, requires us to start by bringing the state back into private law³⁰ – in other words, putting the law of obligations back in its social and political context, and viewing it as a key part of the constitutional institutions of a common law polity.

²³ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

²⁴ *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

²⁵ *Hercules Managements Ltd. v. Ernst & Young* [1997] 2 SCR 165

²⁶ Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts [2014] OJ L158/196.

²⁷ Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities [2014] OJ L 158/77.

²⁸ S Wilson, *The Origins of Modern Financial Crime: Historical foundations and current problems in Britain* (Abingdon, Routledge, 2014).

²⁹ TT Arvind, J Gray, and S Wilson, ‘From the Mid-Nineteenth Century Bank Failures in the UK to the 21st Century Financial Policy Committee – Changing Views of Responsibility for Systemic Stability’ in Hollow, M et al (eds.), *Complexity, Crisis and the Evolution of the Financial System: Critical Perspectives on American and British Banking* (Cheltenham, Edward Elgar, 2015).

³⁰ The idea of ‘bringing the state back in’ draws on a strand of thought within political science, which starting in the 1980s began to point to the importance of studying the organisational structures of governance, and the relationships they have both as between themselves and with the polity, in order to better understand how the operation of government shapes social and political processes. See P Evans et al (eds), *Bringing the State Back In* (Cambridge, Cambridge University Press, 1985)

II. Bringing the State Back in

To suggest bringing the state into private law is controversial, given that private law theory has for the past thirty years striven to get the state out of obligations theory. Theorists calling for a 'private' understanding of the law of obligations have, consistently, rejected the idea that obligations are rooted in public goals, or that it is connected with the state. This reluctance to link the law of obligations with the state appears to have its roots in the idea that doing so robs the law of its principled basis and makes it instead the product of an arbitrary will, turning the judge into a figure akin to a Hobbesian sovereign.³¹ Whilst such a view reflects, arguably, the influence of positivism on common law theory and of the Hobbesian idea of the state on legal positivism, it represents a very narrow understanding both of the state and of obligations. Neither Parliamentary legislators, nor judges, nor administrators, nor any other officials, are despots in modern legal systems, nor do they act capriciously.³² To link the law of obligations with the state is, instead, to suggest that it forms part of the constitutional arrangements of a polity.

On every understanding, the law of obligations is a fundamental part of the political life of a community. It forms part not only of the community's public life, but of that portion of its life by which standards of behaviour and acceptable conduct are created, elaborated, modified, refined and upheld. Any claim in relation to the nature and structure of the law of obligations is, therefore, a claim about the systems and structures its constitution embodies. This is true regardless of whether that claim is a characteristically realist one about the law's social basis or goals, or a characteristically idealist one about the inner reason or principle immanent in the law. To claim that the private law of England or Ireland or Australia is a device for efficiently allocating losses, or a reflection of Kantian ethics, is to claim that there is something about the principles on which English or Irish or Australian society is constituted that legitimises this mode of governance.

Every such claim has two components. Firstly, it entails a claim in relation to the institutional structure of the country's system of governance, positing that in the current institutional setup, the role assigned to the courts is to do a certain thing (e.g., reverse unjust enrichment) but not another (e.g., ensure that resources in society are justly distributed). Secondly, it entails a claim in relation to the nature of the principles that determine how a particular institution of governance should do that certain thing (e.g., that courts should determine whether someone has been unjustly enriched with reference to Kantian conceptions of right, rather than considerations of community welfare).

The focus of past work – from theorists as diverse as Ronald Dworkin³³ and Richard Posner³⁴ – has almost exclusively been on the normative implications of the second of these claims. In the few cases where institutional issues have been considered, the consideration has begun with a certain constitutional ideal and proceeded to explore the implications of that ideal for the content of the law of obligations. Theorists therefore begin, with the idea of liberal democracy as Goldberg and Zipursky did, and move from there to exploring what types of civil recourse such a system might require.³⁵ Others begin with the idea of a society of moral actors, and proceed from there to construct a system of rights that such a society would recognise. Yet others begin with the idea of political morality and work from there to the rights and policies that a legal system must embody.

³¹ See e.g. A Beever, 'Policy in Private Law: An Admission of Failure' (2006) 25 *University of Queensland Law Journal* 287.

³² On this point more broadly, see TT Arvind, 'Vilhelm Lundstedt and the Social Function of Legislation' (2013) 1 *The Theory and Practice of Legislation* 33.

³³ R Dworkin, *Justice for Hedgehogs* (Cambridge MA, Belknap Press, 2011).

³⁴ R Posner, *The Problematics of Moral and Legal Theory* (Cambridge MA, Belknap Press, 1999).

³⁵ JCP Goldberg and BC Zipursky, 'Rights and Responsibility in the Law of Torts' in D Nolan and A Robertson (eds.), *Rights and Private Law* (Oxford, Hart Publishing, 2012).

Whilst this is an entirely logical way to proceed if the aim is to present a purely philosophical vision of the law of obligations which a hypothetical legal system might devise, it is entirely inadequate if the aim is to present an account of the shape of the existing law of obligations. Common law constitutional documents do not set out a self-evident theory of the judicial role in private disputes, nor do they discuss the role of private law adjudication in governance. The constitutional role of these institutions can, therefore, only be gathered from an examination of practice across the common law world, combined with an analysis of what these practices tell us about the role of obligations within the state. The question is not what factors might, in the abstract, justify endowing legal officials with the very significant powers that they currently have to choose between conflicting social expectations and to uphold the preferences of one group over the preferences of another. It is, rather, what it is about common law constitutions that accounts for their being given this role, and how that relates to the roles assigned to other bodies embedded within the state.

This is a task that must begin - as Anne Orford has recently pointed out in relation to international law - with description, analysing the operation of the body in question without preconceptions as to its role or operation.³⁶ Put thus, the question becomes: what form of governance does the law of obligations represent, and what makes it a useful instrument of governance, given the range of other instruments of governance available to a society? This question demands an answer that is not merely normative but also descriptive – an answer, in other words, which is concerned not just with delineating the institutions an ideal community would have, but with understanding and evaluating the institutions which common law jurisdictions have, and the place of the law of obligations within these. The answer to this question must begin by analyzing the relationship between the law of obligations and regulatory frameworks.

III. Obligations and Regulation: Describing the Relationship

The period that has seen the retreat of the law of obligations has also seen a convergence in the direction in which the state has evolved in most common law jurisdictions. This evolution has been marked, in particular, by three trends: the rise of the administrative state, the entrenchment of the idea that the state should provide a certain level of social welfare, and the increased use of direct regulation by executive agencies. Each of these has brought the law of obligations into contact with other agencies of the state in ways with which obligations theory has not fully grappled.

The rise of regulation, for example, has created new rights and duties that have radically altered the character of the legal relations that subsist between persons in society. Securities law, the law pertaining to public utilities, and the law governing financial institutions are the most obvious examples, but there are others. Many of these new regulations lie close to the law of obligations, in the sense that they deal with issues with which the law of obligations can also deal, but are nevertheless remedied through a complaint to a regulatory authority rather than through a civil action. Simultaneously, the growth of the welfare state, and the consequent assumption of more and more responsibilities towards the public by administrative and regulatory bodies, inserted the state into areas of interaction that would otherwise have been occupied entirely by private bodies. These developments raise the question of what distinguishes the law of obligations from the operation of these agencies and aspects of the legal system. Contemporary obligations theory had tended to deal with this question by assuming that regulation and obligations are oriented around achieving fundamentally different things - achieving fair distributions as opposed to corrective justice, or advancing state goals as opposed to defending individual rights. But if we turn to description and, as Orford suggests, examine the *actual* functioning of regulatory bodies rather than philosophical theories as to how they *should* function, the situation can be seen to be a lot more complex, in that regulatory bodies frequently respond in ways that are ordinarily taken to be characteristic of the law of obligations.

³⁶ Anne Orford, 'In praise of description' (2012) 25 *Leiden Journal of International Law* 609.

Financial regulation, once again, serves as a good example. Consider, for instance, the misselling of financial products, such as the misselling of payment protection insurance in the UK or the Commonwealth Bank financial planning scandal in Australia. A central element of the regulatory response in each case – by the FSA in the UK,³⁷ and the ASIC in Australia – was the creation of a formula for compensation that all lenders were required to follow, as well as a process and tests to identify individuals who were victims of misselling. In terms of the factors identified by obligations theory, the regulators' action was triggered by a causative event that is substantially similar to causative events that are the subject of the law of obligations, namely, wrongs. The character of the response, equally, vindicated a right conferred by the law, and reflected the correlativity of the relations between the parties. It would, thus, appear in either case to reflect corrective justice, rights, and other matters traditionally considered to be characteristic, and distinguishing, features of the law of obligations. Nor is this an outlier. *Sturges v Bridgman*³⁸ would today, were it to arise, be a matter for an administrative body in much of the common law world. In England, it would be a case for the local authority exercising statutory powers under the Environment Protection Act 1990, even though the action in nuisance survives. In New Zealand, the situation would in all probability have been dealt with before it arose through the resource consent procedure under the Resource Management Act 1991, with an outcome that might have differed significantly from that actually produced by the operation of the tort of negligence.

Here, then, is the problem. The features that obligations theory claim to be the distinguishing features of the law of obligations – its constitutive essence – do not distinguish it from regulation. The administrative state is as capable of vindicating rights as the law of obligations, and regulatory bodies can provide corrective justice with as much efficacy. The result of the neglect of the relationship between obligations and regulation, and between obligations and the state, is that the law of obligations is withdrawing from having any role in defining the bounds of acceptable conduct in an ever-growing set of areas. Remedying this requires us to put the focus back on the relationship of the common law with the state, and on the question of the contribution of the law of obligations to governance.

IV. Obligations in the Polity

Outside obligations theory, the law of obligations and the institutions that deal with the law of obligations are widely seen as being part of the infrastructure of governance. The World Bank's Governance Indicators, for example, include aspects of the law of obligations (specifically, contract enforcement) within the factors that indicate how good the quality of governance in a country is.³⁹ The point is also not alien to obligations theory, particularly amongst theorists who write from contextualist or realist perspectives.⁴⁰ The reason why it is appropriate and accurate to describe the law of obligations in these terms lies in the nature and character of the relationship between legal and social institutions.

Institutions are created in response to uncertainty – and, specifically, the varieties of uncertainty that arise out of human interaction.⁴¹ Human interaction is uncertain, firstly, in relation to the impact others' actions may have on a person and, secondly, in relation to the impact of future events – including events not within human control – on a person's dealings with others. At the heart of this uncertainty is the problem of conflicting expectations – or, to put it differently, the problem that others will act in the furtherance of goals or expectations that are in conflict with, or not in harmony with, mine. Much of the

³⁷ Specifically, through imposing an enforceable obligation upon financial institutions to follow a particular process and employ specified criteria in responding to complaints of mis-selling. See Policy Statement 10/12 "The assessment and redress of Payment Protection Insurance Complaints."

³⁸ (1879) LR 11 Ch D 852

³⁹ World Bank and IBRD, *A decade of measuring the quality of governance* (World Bank 2006).

⁴⁰ Hugh Collins, for example, has argued that the term 'regulation' encompasses any system of rules intended to govern the behaviour of its subjects. Hugh Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999), 9.

⁴¹ Jack Knight, *Institutions and Social Conflict* (Cambridge, Cambridge University Press, 1992), 1-3.

law of obligations is devoted to dealing with precisely such conflicts - for example, dealing with the conflict between an individual's expectation that he can use his property as he chooses, including for the purpose of making chocolate, against his neighbour's expectation that he should be able to use his property for purposes that require a degree of stillness, such as running a doctor's consulting room;⁴² or a customer's expectations of support from an insurance in the event of a loss caused by insured events, against the company's corporate goals that may lead them to seek to minimize payments they make.

Institutions, as cultural anthropologists have long pointed out,⁴³ deal with the problems of conflicting expectations by creating rules, shared conceptual structures, and entrenched patterns of thought.⁴⁴ These operate by encouraging particular ways of viewing problems,⁴⁵ by defining certain types of conduct as permissible and others as impermissible, and thus influencing the manner in which people behave.⁴⁶ Institutions also uphold these structures by creating a mechanism or system to respond to violations of these norms – or, at least, a belief in the existence of such mechanisms or systems.⁴⁷ It was this phenomenon that the Scandinavian realists referred to as 'legal consciousness',⁴⁸ anticipating by half a century the empirical work of the 1980s.⁴⁹ Legal consciousness ends the uncertainty associated with not knowing how others will behave by engendering a feeling of protection, arising from the consciousness that the legal system will 'make whole' those harmed by actions which transgress the bounds it sets and, through entrenching a feeling that these outcomes are in some sense apposite to that society.

Viewing the law of obligations in this light helps us make sense of otherwise puzzling features of the law, which do not quite fit with what obligations theory tells us the law should look like. The idea of correlativity between the plaintiff and defendant, for example, is foundational to the literature on corrective justice, yet it fits at best uneasily with the law. In particular, the remedial aspect obligation – which, in corrective justice theories, constitutes the actual corrective step – does not in the real world display correlativity. The advent of mandatory liability insurance has deliberately and purposefully moved the law of obligations away from remedial correlativity in the course of the twentieth century.⁵⁰ The majority of claims in areas such as personal injury, but also in relation to damage to commercial property, are today defended and paid by insurance companies. This is not just a simple matter of an indemnity: the result of these arrangements is that the nominal plaintiffs and defendants frequently have little or no influence over, or involvement in, the steps that in theory constitute the actual correction of the wrong.⁵¹ This trend poses a challenge not just for corrective justice theory, but also for the variants of

⁴² *Sturges v Bridgman* (1879) LR 11 Ch D 852

⁴³ See especially M Douglas, *Risk and Blame* (Abingdon, Routledge, 1990); M Douglas, *How Institutions Think* (Syracuse, Syracuse University Press, 1986).

⁴⁴ In early modern common law, these were seen as a source of law, under the head of 'comen erudition' (common learning). See JH Baker, 'Why the History of English Law Has Not Been Finished' (2000) 59 *CLJ* 62.

⁴⁵ See e.g. LM Lopucki, 'Legal Culture, Legal Strategy, and the Law in Lawyers' Heads' (1996) 90 *Northwestern University Law Review* 1498.

⁴⁶ D North, *Institutions, Institutional Change and Economic Performance* (Cambridge, Cambridge University Press, 1990), 3.

⁴⁷ A classic example is the use of the idea of formulae implicating divine retribution in legal forms in antiquity. See e.g. the formulae set out in M.N. Tod, *International Arbitration Amongst the Greeks* (Oxford, Clarendon Press, 1913) 115-6.

⁴⁸ See esp. AV Lundstedt, *Obligationsbegreppet* (Uppsala, L. Norblads Bokhandel, 1930).

⁴⁹ SE Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago, University of Chicago Press, 1990); P Ewick and S Silbey, *The Common Place of Law: Stories From Everyday Life* (Chicago, University of Chicago Press, 1998).

⁵⁰ On the history of this trend, see R Merkin and S Dziobon, *Tort Law and Compulsory Insurance* in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2012).

⁵¹ This point is strikingly made in R Merkin and J Steele, 'Insurance between Neighbours: *Stannard v Gore* and Common Law Liability for Fire' (2013) 25 *JEL* 305, 317.

deterrence theory that characterize the law and economics literature. If, however, the institutional logic underlying the law of obligations is the problem of dealing with the uncertainty that others' actions in pursuit of their own interests may harm your interests, encouraging a system of 'making whole' is both rational and defensible, even if it reflects neither proper correlativity nor deterrence. So, too, is an institutional framework which sets and upholds expectations in relation to the conduct of others, as regulation does. A law of obligations motivated by such a logic thus has much in common with the worlds of regulation and the welfare state, making it easy to see how and why matters can slide from the one to the other as readily as they do in the modern legal system.

Viewing the law of obligations in the light of governance has, however, one further feature whose implications run even deeper. An institution of governance must not just deal with expectations, but with *conflicting* expectations. The role of the law of obligations arises not primarily in cases where there is broad agreement on what the standards are, or whose resolution can be grounded in unchanging moral rights which 'rational people can recognise'.⁵² Its role arises, instead, chiefly in cases where agreement and obviousness are *absent* – and where the law must not just uphold expectations that can easily be derived from unchanging norms and social practices, but resolve a conflict between strongly held expectations which are in conflict, and each of which is consistent with the values, beliefs or goals of a section of society. As such, its defining feature is not consistency, but the deeply embedded inconsistencies and contradictions with which it must deal, and the oppositions it is called upon to overcome.

The emergence of shared expectations, as has been discussed above, depends on the existence of shared frames of reference, and shared understandings of the social significance of facts.⁵³ But in situations where goals, norms and understandings are not shared across the entire populace – as, in a typical society, they will not be – institutional theory suggests that the expectations and ideas of acceptable and unacceptable acts which any given person holds depend upon the community with which that person identifies, and the shared vision of society, claims and resources it reflects.⁵⁴ The history of the law of obligations demonstrates how frequently it has been called upon to do precisely this, from the Statute of Labourers of 1351 and the ensuing Peasant's Revolt of 1381, where the peasants' newfound expectation of freer bargaining following the labour shortages produced by the Black Death clashed head-on with the aristocracy's expectations that the privileges afforded to them by the pre-plague status quo would continue,⁵⁵ to *Taff Vale*⁵⁶ where the expectations of trade unions in relation to the ability to use particular forms minimize liability came into conflict with the employers' expectations in relation to responsibility for willful acts,⁵⁷ to *Rookes v Barnard*,⁵⁸ which brought into sharp contrast the expectation of solidarity amongst workers which the union attempted to enforce, and the opposing expectation held by employers and non-unionised workers that each individual had full freedom of action. In each case, the question for the court was which of these conflicting, but deeply rooted and value-laden, expectations had the greater claim to the law's support.⁵⁹ Conflicting expectations of this type show up in a range of contexts: the

⁵² R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 330.

⁵³ See also J Searle, *Making the Social World: The Structure of Human Civilization* (Oxford, Oxford University Press, 2011).

⁵⁴ For a similar point made from a more traditional moral theoretic perspective, see Michael Sandel's discussion of community and allegiances, and its relation to justice, in M Sandel, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1998), and Peter Gerhart's discussion of the relationship between tort law and community in PM Gerhart, *Tort Law and Social Morality* (Cambridge, Cambridge University Press, 2010).

⁵⁵ See R Palmer, *English Law in the Age of the Black Death* (Chapel Hill, UNC Press, 1993).

⁵⁶ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.

⁵⁷ Cf. John Morgan's description of the decision as reflecting a natural 'adjustment of law to social development'. John Morgan, *Remedies Against the Crown* (London, University of London Press 1925) p. lxxvi.

⁵⁸ [1964] AC 1129 (HL).

⁵⁹ A very similar point was made by the Scandinavian realist thinker Vilhelm Lundstedt in his analysis of the corresponding Swedish cases and legislation concerning the legality of strikes and picketing. See TT Arvind,

press' expectation of absolute press freedom and public figures' expectations in relation to their control over their public images; producers' expectations in relation to the ability to contractually limit responsibility and purchasers' expectations in relation to minimal levels of functionality and quality;⁶⁰ and a range of other areas.

It is this aspect of the 'law-job'⁶¹ discharged by the law of obligations that makes the denial of the connection between it and the state particularly problematic. The task of resolving conflicting expectations is a fundamental aspect of the political life of a community, and the involvement of the law of obligations in this task suggests that it has an important constitutional role, closely related to the roles of other agencies of the state. The question, therefore, is how the manner in which the law of obligations approaches and discharges this task relates to the approaches taken by other agencies. As we will see, the modern law of obligations has within it the potential for two distinct approaches to dealing with the problem of conflicting expectations, the first focused on the *systemic* question of risk management, and the second on the *social* question of embedded expectations. Re-examining the doctrinal structure of the law of obligations in this light helps shed light both on deeper issues underlying various convergences and divergences within the modern law of obligations, and the reasons underlying its retreat.

V. Managing Risk

Let us start with risk management. Obligations theory is today littered with dichotomies built on particular shibboleths – between principle and policy, or distributive and corrective justice, or doctrine and pragmatism. A far more pertinent, but far less considered, dichotomy is that between approaches that are social, and those that are technocratic or managerial. A significant proportion of modern approaches to the law of obligations fall within the latter camp, regardless of whether they argue in favour of either a particular approach to morality – as in theories of corrective justice – or of some particular approach to social engineering – such as modern accounts of 'resilience'. The consequence, in either case, is to argue that social expectations should be settled *not* with reference to the society itself, but with reference to the attainment of goals chosen or paths charted by a sub-sect of that society claiming a greater expertise or ability than ordinary members of that society. Whether this is because of their greater learning in Kant, Giddens or Ricardo is a matter of detail. Either way, the underlying understanding of the role of the law of obligations is the same: it is to remake society in the image of a particular vision of the great society.

Much suggests that this is the direction in which the law of obligations has been evolving over the past decades. The procedural steps that are today associated with the invocation and use of the law of obligations raise serious structural hurdles to the broad-based participation on which social embedding depends, and there appears to be little inclination to change them to facilitate – leave alone encourage – greater or more diverse participation. Consider the procedural structure of the law of obligations. Viewed in the abstract, the law of obligations is a peculiar institution – an odd mix of private self-help and public assistance. On the one hand, the state provides and funds courts and judges to hear and decide cases, and brings the full weight of its coercive power to bear upon the wrongdoer if he happens to lose the case before the courts. On the other hand, it is entirely for the private party to bring or defend his action before the courts and to amass the evidence he requires to discharge the burden of proof. If he does not have the wherewithal to sustain an action or defence through all the stages it may traverse – and in this age of shrinking legal aid budgets it is almost always the individual who must find the resources to

'Beyond rights and duty: Lundstedt's theory of obligations' in D Nolan and A Robertson (eds.), *Rights and Private Law* (Oxford, Hart Publishing, 2012).

⁶⁰ E.g. *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. The history of various doctrines of common law and equity – from unconscionability, to contra proferentem, to fundamental breach – and the wildly divergent answers reached by different common law jurisdictions in England, the US and Australia demonstrate the magnitude of the task of resolving conflicting expectations.

⁶¹ See Karl Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355.

pay either by himself or through a limited range of market-based devices – or if his means do not extend to engaging pleaders as effective as those engaged by the opponent, his wrong will go uncorrected or his privilege undefended. For all that the state is willing to put its coercive powers at his disposal once he has won, it does little to assist him until then, no matter how grave the injustice. In sharp contrast with the operation of regulatory bodies or the welfare state, that is entirely up to him and his resources as a private person, and to whatever he can obtain on the ‘market’ for legal services. Taken together with the procedural and substantive changes discussed in Part 1 of this paper, they suggest that something fundamental has changed about the way the work the law of obligations does in society and governance is conceptualised.

What is the nature of that change? A range of features of the institutions that surround the law of obligations provides a clue. Take, for example, the question of access to the civil court system. What is striking is not just the level of control that judges exercise in determining the type of cases that should come before them, or in determining what type of litigants merit the attention of the courts; but their rule-bound regularity and the economic nature of the criteria on which they are based. Take, too, the involvement of judges in ‘case management’, the role they increasingly adopt through reformulating the law in ways not expressly argued before them,⁶² and the professionalised approach to determining who enters the judiciary with its focus on identifying those most successful in their prior career. These changes, cumulatively, paint a picture of a system of governance that is far closer to regulatory institutions, where the role of the judge is primarily as a technocrat and where judicial governance through the law of obligations is a form of technocracy, than it is to the judiciary of the seventeenth or eighteenth centuries.

The essence of technocracy is the view that experts of a particular type, by virtue of their expertise, are ideally placed to take certain types of decisions. To the extent it has become a form of technocracy, the law of obligations differs from regulation not in its approach to governance, but in the specific domain of expertise of the judges who are tasked with its operation when compared to the local officials tasked with the administration of the Environmental Protection Act, or the officials tasked with the regulation of financial markets under the UK’s Financial Services and Markets Act. This expertise is the primary source from which the law is made and through which it develops. The legal consciousness and ideas of legality constructed by the public are not, in this model, the *source* of the content of the law. They are, rather, its *products*. Legal consciousness – and the conceptual framework of rights, duties, liabilities, legitimate entitlements, acceptable behaviour, and so on – are, as Vilhelm Lundstedt put it, ‘pressed into service’ by the legal system to entrench the conceptions of legality that give the law its legitimacy and power.⁶³

What sort of technocracy, then, does the new common law embody? A full discussion is well beyond the scope of this paper, although it is a topic I have discussed at great length (indeed, book length) elsewhere.⁶⁴ However, four particularly significant characteristics of this approach deserve mention, both because they are deeply embedded in common law doctrine (particularly in England and Wales, but not exclusively in that jurisdiction), and because they highlight important features of a managerial approach.

Firstly, the structure of modern obligations doctrine reflects a preoccupation with facilitating the management of risk. The law of obligations does not itself manage risk – that is to say, its task is not primarily to decide who should bear what risk in relation to which action. It is, rather, to let the parties do so. Unlike the socially embedded approach which will be discussed in section 6, which is expressly focused on determining what types of *conduct* are acceptable, the focus of this approach is to simply set

⁶² See, for example, Richard Buxton’s powerful critique of the judiciary’s action in *Hedley Byrne, Pepper v Hart*, and *A-G v Blake* in R Buxton, ‘How the Common Law Gets Made’ (2009) 125 *LQR* 60.

⁶³ AV Lundstedt, *Legal Thinking Revised* (Uppsala, Almqvist and Wiksell, 1956)

⁶⁴ See TT Arvind, *The Law of Obligations: A New Realist Approach* (Cambridge, Cambridge University Press, in press).

bounds within which one party is expected to manage the risks inherent in its interaction with another party. This is every inch as true of contract as it is of tort. The focus of the ‘other’ element of the test for a duty of care – whether that be the ‘reason’ of the *Anns*⁶⁵ approach of the ‘fair, just and reasonable’ limb of the *Caparo*⁶⁶ approach, or the startling and generally unremarked expansion of assumptions of responsibility into personal injury – is on the precise question of whether something in the parties’ relationship has led to the responsibility for managing some aspect of the risk inherent in their interaction being transferred to one of the parties. The *Reynolds*⁶⁷ defence as applied in cases such as *Flood*⁶⁸ makes far more sense if it is viewed as being, in essence, a framework to enable newspapers to develop sophisticated risk-management strategies to inform the making of publication decisions (as, indeed, most of them have now done) – a perfect counterpart to *Royal Bank of Scotland plc v Etridge*.⁶⁹ So, too, do recent developments in the law of personal injury, including in particular the surprising spread of ‘assumption of responsibility’ to areas far beyond the negligent misstatement / pure economic loss cases that were its original focus, to become as a central tool in determining whether a duty of care existed in personal injury cases.⁷⁰

Secondly, a central element in the facilitation of risk management is the individuation of interaction. Virtually every interaction that takes place is embedded in a complex network of interaction - a person who is at a petrol station buying petrol to drive to a florist to buy flowers to decorate a social evening at which one guest will be a potential client with whom she is hoping to secure an important deal, which will help her to make money to invest in an important expansion of her business... and so on for each of the persons involved in each of these instances of interaction. The doctrines of the law of obligations, in contrast, take their starting point in individuation of these instances of interaction, under each transaction is pulled out of this web and treated in splendid isolation as if it were a simple bipartite transaction unsurrounded by the flow of anterior and posterior transactions (unless those transactions are in some way incorporated into this one). Georg Simmel, whose theories on money have in recent times attracted some attention in the world of obligations theory, described this process as an isolation of instances from the flow of life, a process which he argued was accomplished through the set of concepts we bring to bear in thinking about a situation.⁷¹ A significant proportion of the concepts that comprise the intellectual framework of the law of obligations play precisely this role. Such a representation is not an accurate one, and it periodically causes problems for the law - the *Panatown* problem,⁷² as well as *Coop v Argyll*,⁷³ are particularly clear examples, as is the lesser known but far worse, instance of the attempt by the Irish courts in the pyrite litigation to deal in an individuated manner with complex multipartite transactions.⁷⁴ Nevertheless, this approach is overall a stable one, because it has utility from the perspective of risk management, as cases such as *BAI v Durham*⁷⁵ demonstrate.

Thirdly, individuation is of vital importance to risk management because it permits central aspects of interaction to be turned into what Karl Polanyi, a 20th century economic anthropologist, termed ‘fictitious commodities’ – things which, unlike real commodities, are not produced to meet a demand for

⁶⁵ *Anns v Merton London Borough Council* [1978] AC 728 (HL).

⁶⁶ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

⁶⁷ *Reynolds v Times Newspapers Ltd.* [2001] 2 AC 127

⁶⁸ *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273

⁶⁹ [2002] 2 AC 773.

⁷⁰ See e.g. *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635; *Andrew Risk v Rose Bruford College* [2013] EWHC 3869 (QB).

⁷¹ G Simmel, *The View of Life* (Chicago, University of Chicago Press, 2011).

⁷² *Panatown Ltd v McAlpine Construction Ltd* [2000] 4 All ER 97

⁷³ [1997] 2 WLR 898 (HL).

⁷⁴ *James Elliot Construction Ltd v Irish Asphalt Ltd* [2014] IESC 74; *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269.

⁷⁵ [2012] UKSC 14, [2012] 1 WLR 867.

consumption, but which are nevertheless treated as if they were so.⁷⁶ The consequence of treating an aspect of the world as a fictitious commodity is to permit it to be dealt with through market-oriented techniques – and, in particular, to be regulated through the operation of a price-setting market, rather than through more direct governmental techniques. Unlike Polanyi, who was deeply sceptical about fictitious commodities, this paper takes no position on their desirability. The point I seek to make is that this is the ordinary result of individuation. Obligations function effectively as a system of risk management because the effect of legal doctrine is to turn ‘duty’, ‘risk’, and ‘damage’ into fictitious commodities – things which are divisible in the way commodities are, which can in consequence be traded on a market and priced by marketised techniques (amongst which those associated with insurance occupy a central place),⁷⁷ and which are most effectively managed when they are dealt with in this way. This opens up a range of new techniques for managing risk. The rise of apportionment is a particularly clear example. Injuries and harms themselves resist division. It is in most cases impossible to say that – for instance, the broken rib can be attributed to the second defendant, the broken collarbone to the first defendant, and the broken thigh to the claimant. To turn damage into a fictitious commodity, however, permits the use of techniques of apportionment without such an exercise becoming necessary. The same can be said of duty and risk, both of which can be endlessly sub-divided, transferred and manipulated using complex techniques.

Fourthly, and finally, such an approach is incompatible with any idea of relationality within the law of obligations. Much has been written about the failure of contract law to take adequate account of the relationality inherent in contracting. The discussion in this section has explained why the resulting law might be stable, even if it is based on a distortion of the true nature of the parties’ relationship. If the law is not primarily concerned with setting standards of conduct, the fact that it ignores central aspects of the parties’ relationship is irrelevant. What matters is not the accuracy of the legal representation of the parties’ relationship, but its effectiveness in facilitating the management of risk.

Whilst relational theory is more commonly associated with contract, a far better example of the derelationalisation of the law of obligations can be found in the tort of negligence. Negligence covers at one extreme situations where the interaction between the parties arises purely out of the use of shared resources – two persons who happen to be on the same road at the same time, a crane hoisting a steel beam in the air – where there is no intentional engagement with the person or class of persons to whom the obligation is owed, and where proximity is therefore purely physical, a function of the persons’ shared use of a common resource (“common resource proximity”). At an intermediate level, we have persons who are linked by being part of a network of connected transactions – a producer and a consumer, a bank’s valuer and a house purchaser, a builder and a subsequent purchaser – and whose proximity is a function of the nature of the network and the strength of the links between transactors on that network (“network proximity”). At the relational extreme, we have situations which involve persons whose interaction and engagement with each other occurs in a context that is far removed from that of strangers – an employer and an employee, the parents of a child and the parents of one of the classmates of that child, and so on – and whose proximity is therefore principally a function of their relationship (“relational proximity”). To use a market-based understanding of relations – thus treating one’s counterparties as substitutable fictitious commodities – is to collapse these three categories into common resource negligence, even though they each naturally embody a distinctive set of social expectations and generate very different types of uncertainty. Such a representation is clearly an oversimplification, but if our purpose is simply to make risk-management easier, it is a distortion that is both sustainable and likely to be long-lived.

⁷⁶ K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, 2001).

⁷⁷ On which, see Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013).

VI. Conceptualism and Social Needs

A hallmark of the risk management approach is the relative unimportance within it of the actual task of setting standards of conduct. The law's role is not to set these standards. It is, rather, to create a framework within which they can be set. From this perspective, it is easy to see why such a law would cede an increasing amount of space to regulation, which is expressly concerned with setting such standards. It should also be easy to see why a law whose doctrines were built on such an approach would not necessarily produce salutary results if it were asserted against regulation. The experience of the pyrite litigation in Ireland is a particularly egregious example, in which the invocation of the law of the sale of goods in a complex, multi-level, multipartite and heavily insured transaction produced utter chaos which required high-level regulatory intervention to sort out.

Does this mean that the law of obligations should continue its retreat and withdrawal in the face of regulation? Or does it continue to have a role to play? It is useful to start by contrasting the operation of administrative and regulatory bodies, on the one hand, and the law of obligations on the other. The role of administrative and regulatory bodies tends to lie at two extremes of a spectrum of discretion. Independent *regulators* such as central banks, utilities regulators, and financial watchdogs lie at one end of this spectrum. They tend to be given a broad range of powers, and a lightly restrained discretion, to pursue goals which are clearly defined, but broadly phrased. In the pursuit of these goals, they both apply rules and make rules – thus, in essence, administering rules which they themselves make. They are also assigned specific objectives, which are typically expressly tied to the expectations of a particular group of society, which they are asked to champion or protect – for example, the objective of “the protection of consumers”⁷⁸ which is often assigned to financial watchdogs. Purely *administrative* bodies, in contrast, have far more limited powers. Consumer watchdogs such as the UK's Office of Fair Trading, for example, have the power to issue guidance, but not to make binding rules, nor to themselves directly levy fines. Their role is, rather, investigative, with the actual making and enforcement of binding rules coming from elsewhere.

The law of obligations occupies an intermediate role in this spectrum. Courts applying tort law, for instance, do more than merely enforce and the modern trend is, if anything, to reduce their role in straightforward cases of enforcement – the application of clear rules – by giving jurisdiction to other authorities. Yet the discretion of courts is limited in a way the discretion of regulatory bodies is not. Courts do not have the power to formulate elaborate systems of guidance, analogous to the rule books prepared by regulatory bodies, nor can they entirely remake the law, as regulatory bodies can in successive editions of their rule books. Instead, as the history of the law of obligations demonstrates, the law is made not by a single case, but by a chain of cases through which a court repeatedly revisits the same legal issue in a number of factual contexts. This gives the law of obligations a special character, in that the process by which it resolves conflicting expectations has the potential to be socially embedded, and context-sensitive, in a way no other arm of the state can match.

This is reflected in the manner in which obligations and regulatory make their decisions. The policy guidance that is given to regulatory bodies is, in effect, a directive to *always* prioritise the interests of one class over another. To task a financial regulator with the job of “the protection of consumers” is to require that regulator to necessarily and always favour consumer expectations where they conflict with the expectations of financial service providers – for example, in a situation where the consumer's expectation in relation to the quality of advice conflicts with the financial body's expectation of being able to ‘talk up’ a product, so as to show it in the most favourable light.

The law of obligations, in contrast, has no equivalent. Tort law does not explain why those particular wrongs are redressed, nor does it set out what interests such redress is intended to serve. Equally, the position taken by the law is never as simple as holding that the interests of one will always prevail over

⁷⁸ Financial Services and Markets Act 2000, s. 2(c).

the interests of another. The role of the law of obligations is, instead, to determine the specific contexts in which, and the circumstances under which, one type of interest will prevail; and this determination comes from the repeated consideration of a broad range of contexts and circumstances by different judges over a large number of cases. In the law of obligations, unlike in the operation of regulatory bodies, the setting of an expectation is the aggregate result of a series of decisions – a process which Maitland accurately described as one of ‘blundering into wisdom’ in an ‘empirical fashion’.⁷⁹

The result is that the concepts in which the law of obligations is expressed have a socially embedded character. The problem of liability for the negligent provision of false information provides a good example. The issue can arise in a number of different contexts, ranging from the inclusion of incorrect information in a printed reference work,⁸⁰ to an auditor’s report that negligently presents a company as being sounder than it actually is,⁸¹ or a credit rating report that negligently gives bonds a far higher rating than their underlying fundamentals merit.⁸² Each of these contexts raises a complex mix of conflicting expectations. Take the example of an encyclopaedia of mushrooms which wrongly portrays a mushroom as being safe when it is poisonous, or perhaps insufficiently distinguishes a safe mushroom from an unsafe one.⁸³ On the one hand, the purchaser has an expectation of safety – the very purpose behind buying such a book is to be able to spot dangerous mushrooms, a notoriously difficult task. On the other hand, one has the publishers’ expectation that as simple non-expert intermediaries – mere ‘conduits’, to adopt a phrase from a different area of law – they cannot be expected to spend the time and effort checking the factual accuracy of every book they put out.⁸⁴ Finally, there are the authors’ expectation – common to anyone who gives advice – that they cannot be required to verify every single fact in a book, that the potential liability from a book must be proportionate to the rewards its publication carries, that advice may be wrong, and that persons who choose to take it do so at their peril because nobody can be accurate all the time. Audited accounts and credit rating reports present similar patterns of expectations.

How might a person debating the issue in purely common sense normative terms think about it? It is clearly not standard practice for authors to refrain from publishing unless they are certain that every single thing they say is correct. The question, therefore, is to what extent and in what circumstances we should say that this standard practice in authoring and publishing is wrong. The result might be a scale with instruction manuals for the use of medical equipment close to one end, and a blog with a travelogue about the author’s visit to various beaches and the swimming conditions there on the other.

How does this relate to the law? Reasonableness – with its seductive promise of capturing the thought-style of the man on the Clapham omnibus – is part of the answer. But the law also has its own thought-style, because the Clapham omnibus can only carry us so far. Where social expectations conflict, or are nebulous, the figure of man on the Clapham omnibus is of little use because his answer (or rather, the judge’s estimate of his answer) will depend upon the particular institutional environment in which he operates and the influences this environment exercises upon him, so that different hypothetical passengers on the omnibus will give different answers. The jury system, with its multi-member jury and its safeguards against selection bias, might or might not have helped obviate this particular problem, but the limited role of civil juries in most Commonwealth countries makes that question academic. It is here, therefore, that the distinctly legal component of negligence – the duty of care – steps in. Traditionalist legal theory – and, in particular, legal theories that are based on moral accounts – are hard to reconcile

⁷⁹ FW Maitland, ‘English Law Under Norman Rule’ in HD Traill (ed), *Social England: A Record of the Progress of the People*, 2nd edn (London, Cassell, 1894), 280.

⁸⁰ See e.g. *Alm v Van Nostrand Reinhold* 480 NE2d 1263 (Ill. App. 1 Dist. 1985).

⁸¹ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

⁸² *Bathurst Regional Council v Local Government Financial Services Pty (No. 5)* [2012] FCA 1200.

⁸³ *Winter v G.P. Putnam’s Sons* 938 F. 2d. 1033 (9th Cir. 1991).

⁸⁴ This factor, in particular, has been influential in the US case law on the liability of publishers for incorrect information in printed material. See e.g. *Alm v Van Nostrand Reinhold* 480 NE2d 1263 (Ill. App. 1 Dist. 1985), *Jones v Lippincott* 694 F.Supp. 1216 (D.Md. 1988).

with the specifics of the *Caparo*⁸⁵ approach. But seen as a form of governance oriented towards establishing social expectations, the approach is far more intelligible.

Proximity is arguably the most important and most underestimated component of that approach. At least since *Donoghue*, proximity has given legal recognition to the fact that every person has a broad range of circles of interaction of differing width, which give rise to different expectations. The focus here, therefore, is on the nature and nearness of the relationship between the parties and, thus, on the expectations to which such a degree of closeness could legitimately give rise. The closest type of relationship – privity, established by contract as in, for example, a report produced at the express request of the claimant – will give rise to a range of duties under the contract, including unless excluded implied terms as to quality. The relationship between the publisher and the reader of a commercially produced book, in contrast, is several steps removed in terms of proximity, in that the publisher has little or no role to play in the production of the misleading information that is the subject of the claim. The author and the reader of such a book stand in a relationship of greater proximity, albeit one still some way removed from the far closer relationship between one who specially commissions the production of the report or information. Proximity, in other words, permits the courts to relationalise the manner in which they resolve conflicting expectations, by giving them a conceptual framework for examining how different types of relationships give rise to different types of expectations, and to separate out relational factors that are relevant to the generation of expectations from those that are not.

Foreseeability, similarly, puts the focus on the specific activity that the claimant carried on with the assistance of the misleading information, and on the harm which resulted. As the link between proximity and foreseeability suggest, the cumulative question is whether the degree of proximity is sufficient to create an expectation that the defendant would take steps to avert harm of that specific degree of foreseeability. The third criterion – the fair, just and reasonable analysis – reflects in this particular example the fact that different factual contexts will carry different social expectations, based on factors such as the social perception as to the importance of the defendant's activity, the seriousness of the harm that could result, the dependence of one party upon the other. Contexts that relate to the carrying on of activities that would potentially result in personal injury if not properly informed – for instance, air navigation charts,⁸⁶ or the hypothetical book *How to Make Your Own Parachute* that is often cited in US case law⁸⁷ – are likelier to carry an expectation of care than contexts that would merely result in harm to the goods or to economic loss. Put together, these concepts, as they form part of the law, provide the judge with tools that he or she can use to estimate where social expectations lie if the case relates to existing social expectations, or where they most appropriately fall in the specific social context of the case if the task of the court is to set them.

The latter task necessarily raises more complex issues. As a form of governance, the law of obligations would ordinarily be expected to work in tandem with, rather than in opposition to, other forms of governance. One would therefore ordinarily expect the underlying ideas it reflects in relation to where social expectations should be set, and where they appropriately fall, to be influenced by the policies underlying governance in the country more generally. Unlike government policy, the policies that make their way into the law of obligations will not change at every general election, but they will nevertheless necessarily have their origin in the overall framework for governance and regulation in the relevant society, and the priorities these set. To some extent, *Caparo* itself reflects this. *Caparo* was a case involving the negligent provision of untrue information – in this case, an audited set of accounts for the company that because of the auditor's negligence reflected an untrue picture of the company's financial position. As discussed in a previous section, the manner in which the House of Lords decided that it was the auditor's expectations that would prevail was influenced by the surrounding regulatory context –

⁸⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

⁸⁶ *Aetna v Jeppesen* 642 F.2d 339 (1981)

⁸⁷ *Lewin v McCreight* 655 F.Supp. 282, 284 (E.D. Mich1987).

specifically, the provisions of the Companies Act that mandated the auditing of accounts and their provision to shareholders, and the purpose for which these accounts were provided – through the proximity and foreseeability criteria.

Legal doctrines and concepts are in this approach institutionalised strategies for dealing with the task of managing contradictory expectations, and of determining where social expectations lie or – where they are as yet nebulous – where they more appropriately lie. In the language of the social sciences, these are tools that judges use to estimate latent variables. The principal effect of doctrine is to create (in the language of institutional theory) a distinctively legal set of ‘thought styles’, or ways of thinking about social expectations, social relations, and the manner in which and conditions under which the expectations of one will be required to give way to the contradictory expectations of another – one which within it embeds both interpersonal justice and community welfare,⁸⁸ not as opposites to be reconciled, but as inseparable facets of a whole. The requirement that judges must work with legal doctrine, then, plays the role of translating and transforming the social factors that are the ultimate basis of this decision into the thought styles that characterise the law, but it remains fundamentally socially embedded, and it is this social embedding that gives the law of obligations its power and its enduring relevance.

VII. Conclusion: Constitutionalising Obligations Theory

In a society as concerned with the dangers of risk, and with the top-down nurturing of resilience, the rise of the managerial approach is not entirely surprising, nor is it surprising that it has led to the slow retreat of the law of obligations, and the corresponding rise of regulation. The tone of many current debates about the current law of obligations, as well as about the nature of its past, appear to at least in part be driven by a discomfort with the managerial nature of the modern law of obligations. In seeking to recover older aspects of the law that the modern institution is said to have forgotten the trend has been to seek to return to pre-technocratic modes of governance within obligations. Yet there is nothing inherently positive or negative about technocracy. Any complex society requires a range of different types of institutions to deal effectively, and in a manner that avoids social conflict, with the problems posed by the uncertainty inherent in social existence, and the conflicting expectations that are its products.

Technocratic institutions have a role to play in this mix, not least because they provide an alternate, non-ideological framework within which to discuss social issues. The implications of a turn to technocracy are, rather, constitutional. As this paper has sought to argue, in a managerial framework, the primary factor separating civil courts from regulatory bodies is that the former possess a more widely embedded autonomy. Where this wider embedding is useful (as it is in commercial law or maritime law), the law of obligations is likely to continue to thrive. Where it is less useful than goal-driven technocratic expertise (as in securities law, environmental law or consumer law), it is likely to increasingly give way to regulatory bodies. This is more or less what we currently see in the law of obligations.

This paper has sought to argue for another approach, where the law of obligations is neither subordinate nor superior to public regulation, but is seen as having very different strengths, lying in its incrementalism and its social embeddedness. As this paper has argued, it is the ability of the law of obligations to address issues of social expectations through the manner in which it uses, develops, applies and engages with concepts that give its power, and its constitutional importance. Such an understanding implies a very different, and much broader, role for the law of obligations. Nor is it alien to legal theory. It was fundamental to Scandinavian legal realism. The Scandinavian realists held that if one accepts epistemological realism, and if one accepts (as they did) that the law is a thing that has real existence, then one can describe it in conceptual terms without being normative as long as the concepts one uses have a basis in fact. Form, concepts and doctrine represent the results of the ‘social evaluations’ (as Vilhelm Lundstedt put it) that are embedded in the law. To the Scandinavian realists, understanding what these evaluations are, and how they relate to the concepts used in law, was a critical part of legal analysis.

⁸⁸ A Robertson, ‘On the Function of the Law of Negligence’ (2013) 33 *OJLS* 31.

The question they asked in legal analysis, in essence, was ‘If a concept has reality, what are the (social) facts and evaluations to which its words correspond?’ The power of this approach lies in its ability to restate legal concepts in a way that relates them directly to the social realities to which the concepts apply. What sort of social evaluations do they reflect? What are the facts – the goals, expectations, activities, perceptions, interests, motives, outcomes, preferences – to which these evaluations relate and upon which the value choices they embody are based?

It is the refusal to accept this, and the insistence upon monist principles, that have left this peculiar gap in obligations theory, where the retreat of obligations continues for the most part unremarked. Redressing this requires asking a very different set of questions about the law as it currently is, centring around the question of why we have the rights we do but lack the rights we lack, whose expectations they protect, and why it is so. These are fundamental questions, which we must face and with which we must deal if we want to fight the corner of the law of obligations, and argue for the continuance of the common law tradition it represents.